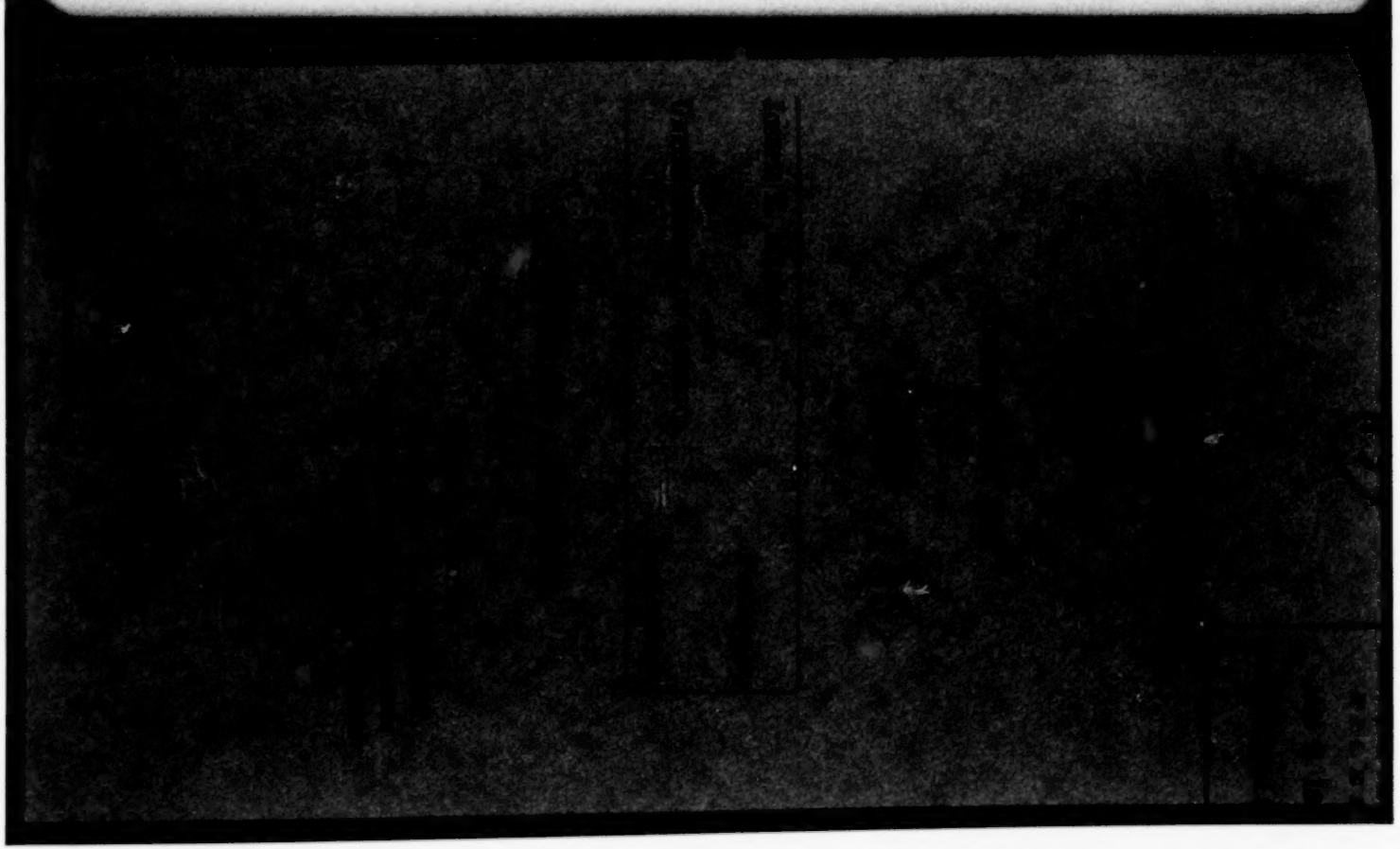

Subject Index

Page

I. The conflict of the Marron decision with other decisions of this court 2

II. An examination of the Marron decision 3

I. Petitioner's contention that his constitutional rights under the Fifth Amendment of the Constitution of the United States were violated is not disposed of in the decision 13

II. Conclusion 16

Table of Authorities Cited

Pages

Adams v. New York, 192 U. S. 585 2

Boyd v. United States, 116 U. S. 627, 628, 29 L. Ed. 749, 750, 6 Sup. Ct. Rep. 524 10

Gouled v. United States, 255 U. S. 298 ..... 7, 14

Kirvin, C. F. v. United States, 5 F. (2d) 282, 285 ..... 6, 13

Petition of Barber, 281 F. 550 13

Steele v. United States, 267 U. S. 498 6

United States v. Hills, 263 F. 812 13

United States v. Kirchenblatt, 16 F. (2d) 202 ..... 6, 13

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 930

JOSEPH E. MARRON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A REHEARING.

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petitioner herein with the utmost respect and deference to this Honorable Court respectfully requests that the decision heretofore and on the 21st day of November, 1927 rendered by this Court be set aside for the reasons hereinafter set forth and that the contentions of the petitioner heretofore briefed and presented by oral argument be reconsidered.

PART ONE.

AN EXAMINATION OF THE DECISION OF THIS HONORABLE COURT, MARRON v. UNITED STATES, UNITED STATES SUPREME COURT, ADVANCE OPINIONS, DECEMBER 1, 1927; 70 Law. Ed. page 45, DISCLOSES TWO FUNDAMENTAL PROPOSITIONS OF LAW, AS APPLIED TO THE FACTS, THAT ARE NOT ONLY INCONSISTENT BUT CONFLICT WITH WELL ESTABLISHED PRECEDENTS OF THIS HONORABLE COURT.

From the inception of this case the Government has consistently taken the position not only before the trial Court but likewise before the United States Circuit Court of Appeals for the Ninth Circuit that the seizure of the ledger and other documents was justifiable as an incident to the execution of the search-warrant in question.

The Government vigorously asserted the merit of this contention during the oral argument of this case before this Honorable Court and bottomed its position upon the authority of *Adams v. New York,* 192 U. S. 585.

Petitioner did with equal vigor combat the position of the Government in this respect and as the opinion of this Court discloses did so successfully.

With equal force this Court decided that the constitutional rights as evidenced by the fourth article of the amendment of the Constitution of the United States had been violated by the seizure of these various documents for the reason that they had not been particularly described as things to be seized in the warrant.

We propose to show that the decision of this Honorable Court should have gone no further; that it ex-

pressed a correct statement of the law as applied to the facts and correctly interpreted the constitutional amendment of the United States of America but that when this Court went further in its decision and decided the seizure of these various documents was justifiable as an incident to the right of the search arising from the arrest of Birdsall while in charge of the premises it permitted itself to fall into error that should not be permitted to remain upon the pages of its decisions.

PART TWO.

AN EXAMINATION OF THE MARRON DECISION.

Petitioner has with care carefully read and digested the opinion of this Court speaking thru Mr. Justice Butler; obviously such an important proposition of law should not be susceptible of two constructions but we are constrained to assert that this opinion discloses such a condition.

The constitutional rights and guarantees of this petitioner have either been protected or violated by the facts as disclosed by the record; this may apear to be a truism but as we shall point out hereafter it appears in this decision that these rights and guarantees were violated on the one hand and protected on the other.

We believe that in the entire history of this Honorable Court such a condition has never been permitted to exist for when this Court has ascertained that these guarantees under the constitution have been violated, it has never sought to determine that if protected in

the one instance that the weight of such protection should be set off against the weight of violation and if protection should out-weigh violation to withhold from a defendant the safe-guards of the constitution.

This assertion is not idly made but finds support in the language of the opinion.

Let us examine the opinion in the light of this statement.

The position of the petitioner stripped of all adornment of legal facts and phases is that the ledger and other documents were not described in the warrant as things to be seized and that as he was not arrested with them upon his person nor present when the seizure was made, such a seizure violated the fourth amendment.

Mr. Justice Butler in the disposition of this proposition thus simply stated divides the legal propositions involved into two premises:

(a) That the seizure was justifiable as an incident to the execution of the search-warrant;

(b) That the seizure was justifiable as an incident to the right of search arising from the arrest of Birdsall, a co-defendant, while in charge of the premises.

Mr. Justice Butler speaking for this Honorable Court decided that the seizure was not justifiable as an incident to the execution of the search-warrant primarily because the ledger and other documents were not particularly described as things to be seized. By virtue of what authority did this Court rely upon in thus deciding this cause? The answer is apparent

*that the constitutional rights of Marron under the fourth and fifth amendments to the Constitution of the United States had been violated because the warrant had not particularly described * * * the things to be seized.*

We find, therefore, that this Court has sustained the position of the petitioner throughout this case and we find further that it has unqualifyingly pronounced its judgment that the constitutional rights of Marron had been violated.

Further argument and further citation of authority would be a work of supererogation.

After having devoted over three quarters of the decision sustaining this position this Honorable Court in the concluding paragraph of the decision states a proposition of *court-made law unsupported by authority* and uses it as an off-set against a violation of the Constitution of the United States.

The concluding paragraph of the opinion above referred to decides that Birdsall at the time of the seizure of the private documents and books of Marron was actually engaged in a conspiracy in maintaining a common nuisance; that a crime was being committed in the presence of arresting officers; that Birdsall was lawfully arrested and that consequently they had a right without a warrant to search the place in order to find and seize things used to carry on the criminal enterprise. That the ledger was a part of the outfit or equipment actually used to commit the offense and that consequently the seizure was valid as an incident to a lawful arrest upon the premises. These state-

ments coming in the opinion as they do immediately after this language:

> *And it is clear that the seizure of the ledger and bills, in the case now under consideration, was not authorized by the warrant. C. F. Kirvin v. United States,* 5 F. (2d) 282, 285; *United States v. Kirchenblatt,* 16 F. (2d) 202; *Steele v. United States,* 267 U. S. 498.

When the agents of the United States entered these premises with the warrant the record disclosed that the only defendant present was Birdsall; that Birdsall was arrested and charged with a violation of the National Prohibition Act; subsequently and after the Government had had an opportunity to *rummage thru and examine the private books and documents that it had seized and which belonged to the petitioner and which this Court had decided was seized in violation of his constitutional rights,* an indictment was returned by the grand jury against Marron, Birdsall and others charging them with a felony, to-wit: criminal conspiracy.

The affidavit upon which the search-warrant was issued (Trans. pp. 55-57) discloses that the crime complained of as having been committed at those premises consisted in the illegal sale and possession of intoxicating liquor in violation of the National Prohibition Act; *it was not averred in the affidavit that the crime of conspiracy was being committed in the premises.*

So that up to the time that the Government examined these private documents of Marron in the security of its own offices *and investigated the things suggested by the entries contained therein by and thru its vari-*

ous agencies, i. e., Intelligence Unit, Dept. of Justice, District Attorney's office and the entire Prohibition Department the crime of conspiracy appears nowhere in the record of this case.

Consequently can it be said with any degree of accuracy that Marron (or Birdsall were known to have been connected with the crime of conspiracy) prior to the seizure and examination of his private records; so much for the statement that a conspiracy was being committed in the presence of these arresting officers.

Was the ledger and the other documents the means of committing this alleged conspiracy or stating the proposition in the language of this Honorable Court:

> "And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense."

Petitioner emphatically insists that in the light of reason and in the light of the adjudication of *Gouled v. United States,* 255 U. S. 298 the ledger and other documents were not the means of committing this conspiracy but on the contrary were evidential only of the fact, if it so existed.

They may have afforded evidence that a crime had been committed; they may have been indicative that a crime had been committed; they may have proved that a crime had been committed but they were not the means or instruments of crime.

In support of this position the petitioner in the briefs heretofore filed in this Court and likewise upon

the oral argument of the case relied upon *Gouled v. United States,* 225 U. S. 298 in support of this very contention namely: that these documents and private papers were not the means or instruments in the commission of the crime but on the contrary were evidential only that a crime had been committed.

It is worthy of comment in passing to state that the *Gouled* case is not discussed, distinguished or even referred to in the opinion, although that case discusses the very point here involved and distinguishes between private books and papers of account as the means or instruments of crime and their aspect as evidential value only that a crime had been committed.

In consideration of the importance attached by petitioner to the conclusions arrived at by this Honorable Court in the *Gouled* case we deem it advisable and likewise necessary to set forth again the facts and the law.

Briefly stated, the facts were that the plaintiff in error Gouled, one Vaughan and an attorney at law were charged with being parties to a conspiracy to defraud the United States in violation of Section 37 of the Federal Criminal Code, and in the second Count in the indictment were charged with having used the mails to promote a scheme to defraud the United States in violation of Section 215 of the Code. Gouled was convicted.

The first two questions concerned the admission in evidence of a paper surreptitiously taken from the office of Gouled by officers of the Intelligence Department of the army. With this feature of the case,

namely, the surreptitious and furtive taking of a man's papers, we have no concern.

The remaining four questions, however, related to papers taken from the defendant's office *under two valid search-warrants,* and it is with these questions that we are vitally concerned.

The *Gouled* case, therefore, may be definitely segregated and construed as establishing two propositions, namely (firstly), surreptitious and furtive taking of a man's private documents; and (secondly) the seizing of them *under a valid search-warrant.*

The private documents of Gouled, seized under the search-warrant, consisted of an unexecuted form of contract between him and one Lavinsky; a written contract executed by the defendant and one Steinthal, and the third a bill for disbursements and professional services rendered by an attorney at law for and on behalf of Gouled. These various documents were alleged in the petition upon which the search-warrant was issued, to have been used in the commission of a felony, to-wit, the bribery of an officer of the United States; it was further alleged in another affidavit that Gouled had at his office certain letters, papers and documents and writings which were related to and had been used in the commission of a felony, to-wit, conspiracy to defraud the United States, upon which charge the defendant Gouled was before the Court.

Subsequent to the seizure of these papers, an indictment was returned and prior to the trial a motion was made on behalf of Gouled for the return of the papers

seized under the search-warrant, which motion was denied.

A duplicate original of the Steinthal contract and the original Lavinsky contract, together with the bill for attorney's fees, were offered and admitted into evidence over the constitutional objections of Gouled, to-wit, the violation of his rights under the Fourth and Fifth Amendments.

Mr. Justice Clark, in his conclusion, made plain the distinction between a search for stolen and forfeited property, counterfeit coins, burglar tools, weapons, implements of gambling and other things of like character. Unquestionably these things were enumerated expressly in the opinion to emphasize the distinction between them and the private books, writings and documents of a citizen, and he likewise was careful to preserve the rights of seizure under search-warrants of private papers, but he added:

> "*they may be resorted to only when the primary right of such search and seizure may be found in the interest which the public or complainant may have in the property to be seized,* but not the right to the possession of it, or where the valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken. (Boyd v. United States.)"
>
> "There is no special sanctity in papers as distinguished from other property to render them immune from search and seizure *if only they fall within the scope of the purpose of the cases in which other property may be seized and if they be adequately described in the affidavit and warrant.*"

The third question certified for consideration is, in the language of the opinion, as follows:

> "Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Secs. 37 and 215 of the United States Criminal Code when taken under search warrants issued pursuant to the Act of June 15th, 1917, from the house or office of the person suspected,—seized and taken in violation of the 4th Amendment?

That the papers involved are of no pecuniary value is of no significance. Many papers, having no pecuniary value to others, are of the greatest possible value to the owners, and the property of a most important character. (Boyd Case, 116 U. S. 627, 628, 29 L. Ed. 749, 750, 6 Sup. Ct. Rep. 524); and since those here involved possessed 'evidential value' against the defendant, we must assume that they were relevant to the issue.

Restraining the questions to the papers described, and first, as to the unexecuted form of contract with Lavinsky, a stranger to the indictment. While the contents of this paper are not given, it is impossible to see how the government could have such an interest in such a paper that, under the principles of law stated, it would have the right to take it into its possession to prevent injury to the public from its use. The government could desire its possession only to use it as evidence against the defendant, and to search for and seize it for such purpose was unlawful.

Likewise the public could be interested in the bill of the attorney for legal services only to the extent that it might be used as evidence, and the seizure of this also was unlawful.

As to the contract with Steinthal, also a stranger to the indictment: *It is not difficult, as we have said, to imagine how an executed written contract might be an important agency or instrumentality, in the bribing of a public servant, and in per-*

> *petrating frauds upon the government, so that it would have a legitimate and important interest in seizing such a paper in order to prevent further frauds upon the government, but the facts necessary to give this contract such a character do not appear in the certificate.* On the contrary, this third question recites that the papers are all of no pecuniary, but are of evidential value, and in the sixth question it is recited that they are 'of evidential value only', so that it is impossible to say, on the record before us, that the government had any interest in it other than an evidence against the accused; and therefore, as to all three papers, the answer to the question must be in the affirmative."

As stated the private documents of Gouled were more damaging in character, kind and degree than the documents seized in the instant case for the reasons that the documents themselves were the actual instruments used in the perpetration of the alleged conspiracy; the alleged conspiracy could never have been consummated if the contracts referred to in that decision had not been drawn to express the intent of the alleged conspirators for we are entitled to assume that were this conspiracy not expressed in the form of these contracts the conspiracy itself would have reposed only in the bosoms of the co-conspirators.

When the contracts were drawn to set forth the propositions of conspiracy the very paper upon which they were drawn then and there became the very instrumentality by which the alleged conspiracy could have been perpetrated.

This Court, however, in declaring the seizure unlawful and speaking through Mr. Justice Clark con-

cluded that these various documents possessed evidential value only and consequently could not be seized nor subsequently admitted into evidence.

What distinction, if any exists between the documents in the Gouled case and the documents in the Marron case? No one thus far has questioned the correctness of the doctrine enunciated in the *Gouled* case but on the contrary it has been referred to and affirmed, upon frequent occasions. It is no answer to the proposition to assert that each case stands and falls upon its own particular and peculiar facts and that therefore, we must consider the type of private documents and memoranda in the Marron case and in the *Gouled* case; fundamentally the documents in each case were the private and personal property of the accused and contained as they did evidence of crime only.

Kirvin v U. S., 5 F. (2nd) 282;
U. S. v. Kirchenblatt, 16 F. (2nd) 202;
Petition of Barber, 281 F. 550;
U. S. v. Hills, 263 F. 812.

THE OPINION IN THE MARRON CASE DOES NOT DISPOSE OF THE PETITIONER'S CONTENTION THAT HIS CONSTITUTIONAL RIGHTS UNDER THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES WERE VIOLATED.

The opinion is silent upon this question.

The ledger and other documents were admitted into evidence over objections and testimony of various witnesses were given at length as to the contents and

as to the authenticity of the documents. Marron was the unwilling source of evidence and was in effect compelled to be a witness against himself in a criminal case in violation of the express provisions of Article V of the amendment to the Constitution of the United States just as effectively as though he were compelled by the Government to take the witness stand and to be then and there interrogated before the Court and jury.

There may be for certain purposes an inter-relation between the fourth and fifth amendments in so far as the right of a person accused of a crime are concerned, but there is nevertheless a separate and distinct line of demarcation between them so that a justification under one does not afford an excuse for a violation under the other.

We are not compelled to go far afield in search of authority to support this contention for we find a complete answer to it in *Gouled v. United States* as follows at page 311:

> "If such papers, so taken, are admitted in evidence against the person from whose house or office they were taken, such person being then on trial for the crime for which he was accused in the affidavit for warrant,—is such admission in evidence a violation of the Fifth Amendment?
>
> The same papers being involved, the answer to this question must be in the affirmative; for, they having been seized in an unconstitutional search, to permit them to be used to evidence would be, in effect, as ruled in the Boyd case to compel the defendant to become a witness against himself."

The next question in order for consideration related to the violation of the defendant's rights under the

Fifth Amendment by the subsequent admission of the seized documents into evidence, and in the language of the opinion.

The fifth question reads:

> "If, in the affidavit for search warrant under Act of June 15, 1927, the party whose premises are to be searched be charged with one crime, and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?
>
> It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of this property under a proper warrant, if a case of crime having been committed and of probable cause is made out, sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid search warrant, when thus lawful obtained by the government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. *The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law;* and if the papers to which the question refers had been of a character to be thus to use them to prove any crime against the accused as to which they constituted relevant evidence."

We most respectfully petition that the court grant a rehearing so that petitioner may present further argument in support of his contention that his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated by the reception into evidence, over objec-

tions, of his private books of account and other private documents.

CONCLUSION.

Supported as we confidently feel we are by the record, we respectfully pray that a rehearing be granted.

Dated, San Francisco,
December 24, 1927.

Respectfully submitted,
HUGH L. SMITH,
BENJAMIN L. MCKINLEY,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

The undersigned does hereby certify that the foregoing petition for a rehearing is well founded in point of law as well as in fact and is presented in good faith and that it is not interposed for delay.

Dated, San Francisco,
December 24, 1927.

HUGH L. SMITH,
Attorney for Petitioner.